A DISTINCTION WITHOUT A DIFFERENCE: ON THE CASE FOR OIRA REVIEW OF RULES BY INDEPENDENT FINANCIAL REGULATORS

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INTRODUCTION

Review of draft regulations by the Office of Information and Regulatory Affairs (OIRA) has been hotly debated from the office's creation.[1] But if the scholarly literature is divided, presidents are not: all presidents since Reagan, Republican and Democrat, have retained OIRA review.[2] Proponents of review usually cite three main benefits. In no particular order, they are the coordination of regulatory policy across the government; improved analysis and hence improved regulatory policy; and consistency of regulations with presidential priorities. By retaining OIRA review, presidents have indicated that, from the vantage point of the Oval Office, the benefits outweigh the costs of review.

From the beginning, OIRA review has excluded the independent agencies, including the independent financial regulators (IFRs) such as the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve (the Fed).[3] This exclusion, too, has been much debated. The purpose of this brief essay is to consider the

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[1] *Compare, e.g.*, Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1076 (1986) (offering an early defense of OIRA review) *with* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059–60 (1986) (offering early criticisms of OIRA review).

[2] President George H.W. Bush retained Reagan's Executive Order 12291. President Clinton replaced E.O. 12291 with E.O. 12866, which each succeeding president has embraced (sometimes with modifications). *See, e.g.*, Exec. Order No. 14094, Modernizing Regulatory Review, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023) ("supplement[ing] and reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866" while amending one provision of that order).

[3] *See* Exec. Order No. 12291, 46 Fed. Reg. 13193, § 1(d) (Feb. 17, 1981); Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 3(b) (Sept. 30, 1993).

extension of OIRA review to the IFRs. In doing so, I draw on both scholarly literature and my own experience as Administrator of OIRA.

A comprehensive examination of the benefits and costs of extending OIRA review to the IFRs would require a much longer article than this one. My purpose is more limited: I aim to show that these benefits and costs would be more or less the same as the benefits and costs of review of executive agency[4] rules. Extension of OIRA review to the IFRs thus follows from the position taken by every president since 1980 and should (all else equal) be the policy of future presidents who endorse the position of their predecessors. Of course, my argument will not persuade those who believe the costs of OIRA review of executive agency regulations outweigh its benefits.

The essay proceeds in two parts. The first shows that the benefits of OIRA review of IFR regulations are basically the same as the benefits of OIRA review of executive agency rules. The second part shows that the costs of OIRA review, too, are more or less the same for IFRs as for executive agencies. While some differences may distinguish the benefits and costs of review of executive agency rules from those attending the review of IFR rules, those differences are modest and do not call my conclusion into serious question.

I. THE BENEFITS OF OIRA REVIEW

A. *Interagency Coordination*

"OIRA review" is something of a misnomer. That is because regulations submitted to OIRA under Executive Order 12866 are reviewed not just by OIRA, but also by many officials at other agencies and at the White House. The interagency input these officials offer provides one main benefit of OIRA review.

When OIRA receives a draft proposed or final regulation for review, it circulates the draft to agencies and White House offices from whose review the rulemaking would benefit.[5] Some of these reviewers have responsibilities implicated by the regulation; they have, in executive parlance, "equities" in the rulemaking. A reviewing agency may, for example, administer a program that would be affected by the regulation, or it may be responsible for the eventual defense of the regulation in court. A White House reviewer may be responsible to the President for a policy portfolio that touches on the regulation. Other reviewers may lack equities in the rulemaking but nevertheless have information useful to the proceeding. For each draft regulation, OIRA staff identify all agencies with relevant equities and information and solicit

4 *I.e.*, agencies that Congress has not made independent by statute.

5 *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854–59 (2013) (describing the interagency review process).

their feedback on the draft. OIRA then transmits that feedback to the agency authoring the regulation. The author agency prepares a new draft of the regulation that responds to the feedback it has received; this draft is typically circulated at least to all agencies that provided feedback in the first round of review, giving them the opportunity to comment again. For the most important rulemakings, interagency review may consist of several iterations of this process.

Much of the input that agencies receive in interagency review is in the nature of friendly amendments that help them toward their policy goals. But sometimes a reviewer opposes one or more of the author agency's objectives, often when the reviewer believes those objectives would undermine its own policy goals. When this happens, the OIRA process helps resolve the policy disagreement. OIRA convenes all relevant decision-makers to hash out the disagreement, elevating to progressively more senior officials as needed. Uncommonly, a disagreement may go to the most senior political appointees for resolution or—in extremely rare but important cases—to the President himself.[6]

The benefits of interagency review are plain to see. First, by identifying and resolving policy disagreements, it helps the executive unite around coherent policy goals and thus achieve those goals. Second, it gives each agency access to the information and expertise of the federal government as a whole.

IFRs stand to gain from these benefits just as other agencies do. IFRs badly need coordination. As Professors Freeman and Rossi observe, "a single financial institution or financial product may be subject to regulation by multiple financial regulators, creating the potential for inconsistencies"[7] in the absence of coordination. Or a single statute may be implemented by multiple agencies; for instance, consider the Community Reinvestment Act, which is jointly administered by two independent agencies (the Fed and the FDIC) and one independent bureau (the Office of the Comptroller of the Currency) that is itself a part of an executive agency (the Department of the Treasury).[8] Further, because "[m]uch of the policymaking of the independent agencies is not functionally distinct from that of executive branch agencies[,]"[9] independent financial regulators often regulate on topics of significant interest to executive regulators. For example, consider the topic of climate and finance, the object of recent or ongoing proceedings by (among others) the independent SEC, the Commodity Futures Trading Commission, and the Fed, as well

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6 *See id.* at 1856–58 (describing the elevation process).

7 Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1148 (2012).

8 *See, e.g.*, Community Reinvestment Act Regulations, 70 Fed. Reg. 44256–01, 44256 (Aug. 2, 2005).

9 Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 591 (1989).

as by (among others) the executive Departments of Labor and Defense.[10] On these topics and others, independent financial regulators need the coordination provided by OIRA's interagency review process.

Further, independent financial regulators stand to gain from access to the expertise and information of executive agencies, and vice versa. For instance, in crafting its climate disclosure rule, the SEC stood to gain from the Environmental Protection Agency's experience administering its longstanding Inventory of U.S. Greenhouse Gas Emissions and Sinks.[11] Conversely, the expertise of the Department of Justice's Antitrust Division may have information to help the SEC analyze the effects of its rules on competition.[12] OIRA's interagency review would provide a channel for information to flow from executive agencies to the IFRs and vice versa.

To be sure, OIRA's is not the only interagency coordination process. There is also the process run by the Financial Stability Oversight Council (FSOC), chaired by the Treasury Secretary. FSOC counts among its members many of the leaders of the IFRs, such as the chairs of the SEC, the FDIC, and the Fed.[13] Among FSOC's duties are "monitor[ing] domestic and international financial regulatory proposals" and "facilitat[ing] information sharing and coordination among the member agencies and other . . . agencies regarding domestic financial services policy development [and] rulemaking."[14] We may wonder, then, whether FSOC already adequately provides the IFRs with interagency coordination.

But FSOC cannot provide anything like the full range of benefits of OIRA review. FSOC's membership is limited to finance-related agencies,[15] so it cannot coordinate with and provide access to information held by non-finance-related agencies. But as the examples earlier in this section show, IFRs need to coordinate and share information with these agencies, not just with other IFRs. Further, FSOC is limited to addressing threats to financial stability.[16] Many important rulemakings by IFRs fall outside this remit. And FSOC lacks OIRA's long and extensive experience administering

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10 *See, e.g.*, Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 88 Fed. Reg. 74183–01 (Oct. 30, 2023); Department of Labor, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73822 (Dec. 1, 2022); Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (Nov. 14, 2022); The Enhancement and Standardization of Climate-Related Disclosures for Investor*s*, 87 Fed. Reg. 21334 (Apr. 11, 2022).

11 *See Inventory of U.S. Greenhouse Gas Emissions and Sinks*, ENV'T PROT. AGENCY, https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks (last visited Dec. 15, 2023).

12 *See* 15 U.S.C. § 78c(f) (instructing the SEC to "consider … whether the [regulatory] action will promote efficiency, competition, and capital formation").

13 12 U.S.C. § 5321(b)(1).

14 *Id.* §§ 5322(a)(2)(D), (E).

15 *Id.* § 5321(b)(1).

16 *See id.* § 5322(a)(1).

interagency review.[17] In light of these limitations, it is clear that OIRA's interagency process would provide important benefits above and beyond those offered by FSOC.

B. *Cost-Benefit Analysis*

Another main benefit of OIRA review is improved cost-benefit analysis ("CBA"). By CBA I mean analysis that identifies and compares the desirable and undesirable consequences of regulatory action. Some, though not all, agency CBA quantifies costs and benefits.[18] CBA, whether quantitative or qualitative, serves two principal purposes. First, by clarifying the costs and benefits attendant on the various courses of action open to an agency, CBA helps the agency reach better decisions about whether to regulate and, if so, how to do so to best effect. Second, publicly-disclosed CBA helps decision-makers outside the executive branch—most importantly Congress and the voting public—to assess agency regulatory decisions and embrace or disavow them.[19]

Executive Order 12866 requires agencies to submit to OIRA with each draft proposed or final regulation an "assessment of the potential costs and benefits of the regulatory action."[20] Assessments may include both quantified and unquantified costs and benefits.[21] OIRA frequently provides feedback on agencies' CBA, feedback which may call for further exploration of overlooked benefits or costs, test the agencies' assumptions, identify calculation errors, ask for additional disclosures and explanations, and otherwise promote accuracy and transparency.

OIRA review powerfully bolsters agency CBA. In the first place, through their work reviewing thousands of regulations over the decades, the OIRA staff have built up extensive expertise in assessing costs and benefits. OIRA review makes this expertise available to agencies, each of which has

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17 This lack of experience may explain the "limited role" that FSOC seems to have played in coordinating rulemakings among member agencies. *See* GOV'T ACCOUNTABILITY OFF., GAO-12-151, DODD-FRANK ACT REGULATIONS: IMPLEMENTATION COULD BENEFIT FROM ADDITIONAL ANALYSES AND COORDINATION front matter, 27–28 (2011).

18 *See, e.g.*, Exec. Order. No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 § 1(a) (Sept. 30, 1993) ("Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.").

19 *See, e.g.*, Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2014–15 (2013).

20 Exec. Order No. 12866, 58 Fed. Reg. 51735, § 6(a)(3)(B).

21 *See id.* § 6(a)(3)(C) (requiring quantification, "to the extent feasible," of costs and benefits anticipated from economically significant regulations); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR. No. A-4, REGULATORY ANALYSIS 44 (2023) (preferring "[s]ound quantitative estimates of benefits and costs, where feasible, [over] qualitative descriptions of benefits and costs").

much less experience than OIRA with CBA.[22] Further, because the OIRA staff are generally not privy to the development of a given regulation or beholden to the author agency, they can provide an important outside perspective and check on agency CBA. Indeed, the mere knowledge of eventual review by OIRA prompts higher-quality agency CBA.[23] By leading to CBA that more accurately accounts for the benefits and costs of regulatory action, OIRA review sets agencies up to make better decisions about whether and how to regulate. Likewise, it assists Congress and members of the public to form truer notions of the effects of regulations and therefore to make better-informed decisions about whether to accept or reject those decisions through legislation and elections.

IFRs need the benefits of sound CBA just as executive agencies do. Some scholars have argued that financial rulemakings tend to be less susceptible to quantified CBA than other kinds of rulemakings.[24] It is not my purpose here to dispute that position. My point is more basic: IFRs, as other agencies, need to give careful consideration (quantitative or qualitative as the nature of the case demands) to the likely consequences of their regulations—a point that even scholars skeptical of quantified CBA for financial regulations readily concede.[25]

OIRA review would strengthen IFRs' CBA in much the same way that it strengthens executive agencies'. OIRA has broad and deep experience reviewing both quantitative and qualitative CBA. This experience equips OIRA staff to illuminate IFRs' assessment of costs and benefits, regardless of whether that assessment is predominantly quantitative or qualitative; there is no reason to believe that the OIRA staff's insights are less valuable where qualitative analysis is concerned. Further, there is every reason to believe OIRA's outside perspective would provide as valuable a check on CBA by IFRs as by executive agencies. True, the subject matter of some IFR regulations is quite complex and arcane, and IFR staff may well have deeper expertise in it than do OIRA staff. But that comparison does not distinguish IFR regulations from regulations by a number of executive agencies which also regulate in complex, highly specialized fields.

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22 *See, e.g.*, Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBLEMS 129, 153 (2015).

23 *See, e.g.*, Ryan Bubb, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78 L. & CONTEMP. PROBLEMS 47, 50 (2015).

24 *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 999–1003 (2015).

25 *See id.* at 1009 ("[I]t is hard to imagine conducting any sort of policy analysis without at least engaging in tacit conceptual" CBA).

C. *Democratic Responsiveness*

The third major benefit of OIRA review is enhancing the democratic responsiveness of the regulations that OIRA reviews. OIRA review creates opportunities for a wide range of executive officials to review draft regulations. Among them are political appointees, both at agencies and at various White House offices such as the Domestic Policy Council and the National Economic Council. These appointees often hold their positions on the basis of their alignment with the President's vision on the policy issues entrusted to their care.[26] Further, the many rewards a president can bestow on faithful and successful lieutenants, as well as the penalties of perceived ineffectiveness, give them incentives to implement (and to be seen to implement) that vision. OIRA's interagency review gives these officials the chance to provide feedback that, if accepted, brings regulations closer to the President's policy vision.

Of course, OIRA review also creates opportunities for officials to inject views that diverge from the President's. But elevation within the OIRA process tends to winnow out such divergent views. For one thing, elevation sends a disagreement to more senior officials who are likely to have greater access to the President and his policy vision and who presumably have been selected for their posts with greater care to ensure their alignment with that vision. For another, officials who believe the President would sustain their position have, all else equal, stronger incentives to seek elevation than officials engaged in advocacy of their own pet policies. And as a dispute moves higher up the chain of command and thus closer to the President, officials experience increased incentives to take positions they would be able to defend, if called upon to do so, before the President or someone holding his proxy. The upshot is that the elevation process tends to help agencies discover the President's views on the subjects on which they propose to regulate.

This discovery in turn can make regulations more responsive to the policy views of an electoral majority of Americans. That is because presidents are representative: they are elected by the people and have powerful incentives to pursue policies that an electoral majority supports.[27] To be sure, presidents transmit majority views imperfectly;[28] nevertheless, when all is said and done, presidential input is likely to result in regulations more closely aligned with these views than regulations lacking such input.

IFRs stand to benefit from presidential input just as much as executive agencies. After all, IFRs' regulations, like executive agencies', implicate just

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[26] *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1130–31 (2008).

[27] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334–35 (2001).

[28] *See, e.g.*, Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355 (1990).

the sort of political questions for which democratic responsiveness is vital. Few beliefs from the early days of administration have fared as poorly as the notion that administration can be cordoned off from politics;[29] it is now perfectly clear that the IFRs and other commissions resolve the same sorts of policy questions that the people's representatives do.[30] If democratic responsiveness is important for the resolution of these questions by both Congress and the executive agencies, it is important for the IFRs, too.

Nor do the statutes administered by the IFRs guarantee such responsiveness on their own. If anything, these statutes tend to be more open-ended than those administered by executive agencies[31] and hence more in need of democratically-responsive direction. Many of these statutes rely on essentially contentless terms that can give no guidance. The SEC, for instance, enjoys authority to make rules that are "necessary or appropriate" to protect investors and "insure fair dealing" in securities or the "fair administration" of securities exchanges.[32] Giving content to these and similar terms demands the kind of evaluative judgments that are at the heart of politics and for which democratic responsiveness is critical.

II. THE COSTS OF OIRA REVIEW

Even the most beneficial processes come with costs, and OIRA review is no exception. Many of the costs IFRs would experience are plainly the same as those executive agencies bear. But two kinds of costs may at first glance seem higher for IFRs: the transaction costs of rule issuance and the costs to IFR independence.

A. *Transaction Costs*

Most IFRs are multi-member commissions, and rulemaking typically requires the concurrence of multiple commissioners. The commissioners may well not see eye to eye, so rulemaking may involve considerable costs as the commissioners negotiate among themselves, driving up the staff resources necessary for rulemaking and drawing out the timeline for completion of rules. We may wonder whether the costs of these negotiations would make OIRA review more costly for IFRs than for executive agencies, since (unlike in the case of executive agencies) each OIRA passback could

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29 *See, e.g.*, Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 212, 215 (1887).

30 *See, e.g.*, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975).

31 *See, e.g.*, Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 478–80 (1987).

32 15 U.S.C. §§ 78m(a), 78s(c), 78w(a)(1).

precipitate new negotiations among the IFR commissioners.[33] It is not difficult to imagine commissioners coming to rest on a draft proposal after extensive deliberation only to go back to the drawing board after receiving adverse feedback from OIRA.

I think this concern is considerably overstated. For one thing, executive agency rulemakings also often involve extensive intra-agency coordination.[34] For an executive agency as for an IFR, responding to an OIRA passback may well involve complex negotiations among various officials and offices.[35] It is far from clear that negotiations at IFRs are more costly than at complex executive agencies.

For another thing, IFRs and OIRA have options to limit the transaction costs of OIRA review by modifying the review process. OIRA's 2018 memorandum of understanding with the Treasury Department about the review of tax regulations illustrates the point. There, OIRA and Treasury agreed to an accelerated timeline for the review of tax regulations: 45 days for most tax regulations and an ultra-speedy 10 days for designated Tax Cuts and Jobs Act regulations.[36] OIRA and Treasury also agreed to a phase-in period for certain analytic requirements for CBA accompanying tax regulations.[37] These provisions curtailed the costs, in both staff resources and rulemaking delay, of OIRA review; they would have the same effect if employed in the context of OIRA review of IFR rules. And OIRA and IFRs have a number of other options for ensuring that OIRA review of IFR rulemakings would not unduly drive up the transaction costs of IFR rulemakings.[38] In light of these options, while IFRs' multi-member structure may mean that the transaction costs of OIRA review are somewhat higher than for executive agencies, this difference is not bound to be large.

33 *See* Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. UNIV. L. REV. 733, 747–48 (2018).

34 *See* Anya Bernstein & Cristina Rodriguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1628 (2023).

35 *Cf.* Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174, 1198 (2019) ("[E]ven in single-headed agencies, regulatory drafting involves many internal constituencies with conflicting points of view.").

36 *Memorandum of Understanding, The Dep't of the Treasury and the Off. of Mgmt. and Budget Review of Tax Regulations Under Exec. Order 12866* (Apr. 11, 2018), https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.

37 *Id.*

38 For an excellent discussion of the various design options that OIRA and independent agencies may consider, *see* Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 715–17 (2020).

B. *Costs to IFR Independence*

Perhaps the most intensely-felt concern about extending OIRA review to IFRs is that doing so would give the President power over financial rule-makings that Congress has chosen to withhold from him and that he ought not in any event to have.[39]

To understand why these concerns are overstated, we first need to see that agency independence exists on a spectrum. There is no "independence switch" that Congress toggles on or off; rather, Congress chooses among provisions that facilitate or impede presidential control in varying degrees.[40] Take the quintessential marker of agency independence, for-cause removal protection.[41] Forbidding the President to remove an agency head except for cause renders the agency head less dependent on the President's favor and therefore less incentivized to follow his direction. But it does not insulate him entirely from presidential influence, for the President retains many means to sway agency action, from the promise to bless the agency head's future political ambitions to the threat to withdraw support for the agency's budgetary needs.[42] Much the same can be said for other protections Congress may employ; each reduces presidential influence, but none eliminate presidential influence entirely. The many channels of presidential influence explain why presidents can, and do, influence the action of even independent agencies.[43]

Congress is doubtless aware that presidential influence flows through many channels, so we should not read statutes blocking some of those channels as attempting to confer total independence from presidential influence. Indeed, Congress has chosen to *enhance* some kinds of White House influence over independent agencies[44]—a choice that shows Congress's acceptance of some sorts of presidential guidance of even independent agencies. The better reading of the relevant statutes is that Congress means just what it says: it intends agency heads to enjoy just those protections that it

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39 This essay does not address the constitutionality of provisions conferring various forms of insulation from presidential control.

40 *See* Kirti Datla & Richard L. Revesz, *Deconstructing Administrative Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 825–27 (2013).

41 *See, e.g.*, Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000).

42 *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 27–32 (2013) (listing various means of presidential control of agencies).

43 A well-known example is President Obama's successful call for a robust net neutrality rule from the Federal Communications Commission. *See* Haley Sweetland Edwards, *Inside Obama's Net Neutrality Power Play*, TIME (Nov. 11, 2014).

44 Such as in the Paperwork Reduction Act, which gives OIRA authority to review and approve information collection requests even of independent agencies. *See* 44 U.S.C. §§ 3502(1), 3503(b), 3504(c)(1).

gives them in statute, knowing that presidents will use the channels Congress does not block to influence agency heads.[45]

If that's right, then our question is straightforward: we need to ask whether OIRA review of IFR rulemakings would impinge on any of the particular protections with which Congress has surrounded the IFR heads. It would not. OIRA review consists in an exchange of information among author agencies, OIRA, and the broader executive branch. This exchange, even when it involves information about the President's policy preferences, does not violate any statutory protections.[46] To inform an agency head of the President's policy direction is not to terminate him, shorten his tenure, take away his litigating authority, or compromise any of the other protections Congress has afforded. Because Congress has not protected independent agency heads from OIRA review, extending review to IFR rulemakings would not come at a cost to statutory protections. (Of course, this is not to say whether various forms of discipline for failure to follow presidential direction as conveyed through OIRA review would violate the IFRs' statutory protections.)

Yet putting all this aside, some will find the prospect of enhancing presidential power over the financial system troubling. Presidents face strong temptations to use their power to help their supporters at the expense of their opponents—an abuse familiar to the American Founders under the term "faction."[47] Expanding presidential power over the IFRs would create more opportunities for presidential factionalism.

This risk should not be dismissed; indeed, to my mind, the danger of presidential factionalism is one of the most distressing potentials of today's administrative state. But it is not unique to financial rulemakings. Environmental, labor, and health regulations likewise offer extensive opportunities for presidents to form factions; there is no reason to think that financial regulation presents a greater risk of faction than regulations in these other domains. And that is enough to resolve our question here, which is just whether OIRA review of IFR rulemakings presents a different balance of benefits and costs than OIRA review of rulemakings by executive agencies.[48]

45 *See* Datla & Revesz, *supra* note 40, at 827–36.

46 *See, e.g.*, Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, 43 Op. O.L.C. (2019). Nor would a presidential directive to the IFRs to participate in the OIRA process. *See id.*

47 *See, e.g.*, Paul J. Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines* 24 (Gray Ctr. Working Paper No. 23-32, 2023).

48 It may be that monetary policy presents an especially grave risk of presidential factionalism on account of the strong temptation to tamper that presidents would face immediately before an election. *See, e.g.*, Nathaniel Beck, *Elections and the Fed: Is There a Political Monetary Cycle?*, 31 AM. J. OF POL. SCI. 194, 196–97 (1987). But because monetary policy is for the most part not set by regulation, we can put aside this question.

CONCLUSION

At day's end, the benefits and costs of OIRA review of IFR rules would likely be about the same as the benefits and costs of review of executive agency rules. Perhaps they are not *exactly* the same. IFRs already receive some relatively modest interagency coordination from their participation in FSOC. And while I expect OIRA and IFRs could hammer out a review process that minimizes transaction costs, it may be that those costs would nevertheless exceed by some measure the costs of review to executive agencies. But these differences are likely to be modest. Those who find themselves in agreement with the consensus of the last seven presidents about the value of OIRA review, then, have good reason to extend OIRA review to the IFRs.